Supreme Court, U.S.
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No. 01-1731

In the Supreme Court of the United States

DONALD RAPIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's convictions under 18 U.S.C. 2252A(a)(1) and 2252A(a)(5)(B) for knowingly transporting and knowingly possessing child pornography must be reversed in light of *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002).

2. Whether the fact of petitioner's prior conviction, which results in a mandatory minimum term of imprisonment under the recidivist provision of 18 U.S.C. 2252A(b)(1), must be alleged in the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A5) is unpublished, but the judgment is noted at 31 Fed. Appx. 836 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2002. The petition for a writ of certiorari was filed on April 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of transporting child pornography in interstate and foreign commerce, in violation of 18 U.S.C. 2252A(a)(1), and of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. 10. Petitioner was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Pet. 11. He was also fined $6000. Pet. App. B8. The court of appeals affirmed. *Id.* at A3-A5.

1. On July 4, 1999, petitioner flew into Houston Intercontinental Airport from Bangkok, Thailand. Gov't C.A. Br. 4. Petitioner was referred to a secondary inspection area because in 1997, federal customs agents conducting an undercover operation had identified petitioner as a potential violator of federal child pornography laws. *Id.* at 3-4. Petitioner had a laptop computer with him and was asked about its contents. *Id.* at 4. Petitioner said he had some pictures from his trip to Bangkok and some pictures he had downloaded from the Internet. *Ibid.* Petitioner's laptop was found to contain a number of images, including a picture of petitioner performing oral sex on an Asian male of undetermined age. *Ibid.* Because the age of the subject of the picture was undetermined, the laptop computer was retained for further analysis. *Ibid.* On July 15, 1999, images of young children wearing shorts or swimsuits were found on the laptop, intermingled with pictures of adults engaged in homosexual activity. *Id.* at 4-5. On August 11, 1999, customs agents reviewed the files on petitioner's laptop and discovered sexually explicit images of children. *Id.* at 5.

2. On February 14, 2000, petitioner was charged in a two-count indictment with knowingly transporting child pornography in interstate and foreign commerce in violation of 18 U.S.C. 2252A(a)(1) (transportation count) and with knowingly possessing a computer and other material that contained an image of child pornography that had been mailed, shipped, or transported in interstate and foreign commerce in violation of 18 U.S.C. 2252A(a)(5)(B) (possession count). Pet. App. C2-C5. The indictment alleged all four definitions of "child pornography" set forth in 18 U.S.C. 2256(8). Pet. App. C3-C4.[1]

3. On March 6, 2000, without entering into an agreement with the government, petitioner pleaded guilty to both counts of the indictment. Pet. 10; 3/6/00 Tr. 3-4. Petitioner admitted to intentionally downloading images of children engaging in sexual activity

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[1] 18 U.S.C. 2256(8) defines "child pornography" as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

and to transporting child pornography in his computer. *Id.* at 16, 20-21.

Based on the findings of the Presentence Investigation Report (PSR), the district court found petitioner's offense level to be 18 and his criminal history category to be 1. Pet. App. B11. Petitioner's Guidelines sentencing range was thus 27 to 33 months of imprisonment. *Ibid.* The PSR noted, however, that petitioner had previously pleaded guilty to indecency with a child and had been "sentenced to 10 years[']' deferred adjudication." PSR para. 36. Because petitioner had previously been convicted of an offense "relating to * * * sexual abuse * * * involving a minor," 18 U.S.C. 2252A(b)(1) mandated a minimum sentence of five years of imprisonment on the transportation count, and 18 U.S.C. 2252A(b)(2) mandated a minimum sentence of two years of imprisonment on the possession count. Accordingly, the PSR indicated that the Guidelines sentence would be 60 months of imprisonment, pursuant to Sentencing Guidelines § 5G1.1(b). PSR para. 55.

4. On May 23, 2000, the government filed a Notice of Sentence Enhancement giving petitioner notice of its intent to seek enhancements pursuant to 18 U.S.C. 2252A(b)(1) and 2252A(b)(2). On May 26, 2000, at a scheduled sentencing hearing, the district court gave petitioner an opportunity to withdraw his plea of guilty. 5/26/00 Tr. 3. Petitioner declined the offer. *Id.* at 16. The district court therefore sentenced petitioner to 60 months of imprisonment on each count, to run concurrently, and to be followed by three years of super-

vised release on each count, to run concurrently. *Id.* at 44-45, 52-53.[2]

5. The court of appeals affirmed. Pet. App. A3-A5. First, the court ruled that the district court's failure to notify petitioner at the time of his guilty plea of the mandatory minimum term of imprisonment applicable as a result of his prior conviction was harmless error because before sentencing, the district court put petitioner on notice of the mandatory minimum sentence and provided him the opportunity to withdraw his guilty plea, but he declined that opportunity. *Id.* at A3-A4. Second, the court rejected petitioner's argument that his deferred adjudication of guilt was not a prior conviction within the meaning of the enhancement provision of 18 U.S.C. 2252A(b). Pet. App. A4. Third, the court concluded that the district court had not compromised petitioner's ability to withdraw his guilty plea by ordering him to register as a sex offender with the State of Texas and to participate in a course for sexual offenders, because the district court did not order petitioner to do so. *Id.* at A4-A5. Fourth, the court of appeals rejected petitioner's complaint that the government had not provided adequate notice of its intention

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[2] Early in the sentencing hearing, the district court recognized that the statutory minimum sentence on the possession count was two years of imprisonment, not five years of imprisonment, as set by 18 U.S.C. 2252A(b)(2); 5/26/00 Tr. 13, but when the court actually pronounced sentence, *id.* at 52-53, the court sentenced petitioner to a term of 60 months of imprisonment on each count, to run concurrently. The judgment also indicates that petitioner was sentenced to a 60-month term of imprisonment on each count, to run concurrently. Pet. App. B3-B4. Petitioner does not complain about this error with respect to the possession count and in any event, the error is harmless because the sentences run concurrently.

to seek enhancement of his sentence earlier because the government is not statutorily required to provide notice of its intention to seek an enhanced sentence under Section 2252A(b), and because the court would have been bound to enforce a statutory mandatory minimum sentence in petitioner's case even if the government had not sought an enhanced penalty. *Id.* at A5.

DISCUSSION

1. Petitioner argues for the first time (Pet. 13-14) that his convictions under 18 U.S.C. 2252A(a)(1) and 2252A(a)(5)(B) are unconstitutional under this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002). Because petitioner failed to raise that claim below, it may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997).

In *Free Speech Coalition*, this Court struck down as overbroad under the First Amendment both 18 U.S.C. 2256(8)(B), which defines "child pornography" as "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and 18 U.S.C. 2256(8)(D), which defines "child pornography" as any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that it depicts "a minor engaged in sexually explicit conduct." 122 S. Ct. at 1396-1406. The Court concluded that both subsections "proscribe[] a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973),] nor child pornography under [*New York* v.] *Ferber*[, 458 U.S. 747 (1982)]." *Id.* at 1396; see *id.* at 1405-1406.

Petitioner's indictment listed all four definitions of "child pornography" set forth in Section 2256(8), including the two invalidated by this Court in *Free Speech Coalition*. The inclusion of the two invalid provisions constitutes error that is "plain," in that it became "clear" or "obvious" after the decision in *Free Speech Coalition*. See *Johnson*, 520 U.S. at 467-468. Petitioner is not entitled to relief, however, unless he also demonstrates that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002) (quoting *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993))) (internal quotation marks omitted). The record does not indicate which of the four definitions of child pornography formed the basis for petitioner's plea of guilty. Therefore, it is unclear whether the error in petitioner's case affected his "substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 122 S. Ct. at 1785. Review of whether petitioner can make the requisite showing should be conducted by the court of appeals in the first instance. The petition for certiorari should therefore be granted, the judgment vacated, and the case remanded for further consideration in light of *Free Speech Coalition*.

2. Petitioner's second claim is that the district court violated the Constitution by imposing a mandatory minimum term of imprisonment under the recidivist provision of 18 U.S.C. 2252A(b)(1) based on a prior conviction that was not alleged in the indictment. The claim is without merit. This Court held in *Harris* v. *United States*, 122 S. Ct. 2406 (2002), that the Constitution does not require that a factor that triggers a

mandatory minimum "be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." 122 S. Ct. at 2409, 2414 (plurality opinion). Furthermore, this Court has held that a prior conviction need not be alleged in the indictment or proved beyond a reasonable doubt even if it increases the maximum length of the sentence. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

CONCLUSION

With respect to the first question presented the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *supra*. In all other respects, the petition should be denied.

Respectfully submitted.

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